United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

Brief for Appellant

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

419

No. 17,455

EDWARD G. ROBINSON, Appellant

v.

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District
Court for the District of Columbia

KITTY BLAIR FRANK
1518 K Street, N. W.
Washington 5, D. C.

(Counsel for Appellant by
appointment of this Court)

QUESTIONS PRESENTED

1. Whether the order and report on appellant's mental competency, couched in such bare legal conclusions, so resolved the question of mental disease or defect as to preclude any defense based on mental competency from being developed for jury consideration.

2. Whether the trial court erred in denying appellant's motion for an expert witness (ophthalmologist) to examine an identification witness for the prosecution.

3. Whether the trial court erred in limiting cross-examination of this same identification witness as to vision competency.

4. Whether the prosecutor's later argument on the faultlessness of the vision of this witness was prejudicial in its context.

5. Whether the prosecutor's closing rebuttal argument on the failure of the defendant to account for himself on the night of the robbery was prejudicial in its context.

INDEX AND TABLE OF CASES

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction over this case under 18 U.S.C. 3231 for a robbery indictment under 22 D. C. Code 2901 (1961 Ed.) and jurisdiction is vested in this Court by virtue of 29 U.S.C. 1291 after conviction and appeal in forma pauperis.

STATEMENT OF THE CASE

After indictment for a robbery (22 D.C. Code 2901, 1961 Ed.) on January 13, 1962, (e.g. J.A.) defendant Edward G. Robinson, the appellant in this court, was ordered committed for psychiatric examination to Saint Elizabeth's Hospital on April 30, 1962, for a period not to exceed ninety days. (e.g. J.A.). In compliance with the terms of the court order, on July 28, 1962, the Superintendant of Saint Elizabeth's Hospital filed an opinion that, "Mr. Robinson is mentally competent to understand the nature of the proceedings against him and to consult properly with counsel in his own defense. We find no mental disease or defect existing at the present time nor on or about January 13, 1962."

The action against appellant and his co-defendant, Enos Reid, was ultimately called for trial on October 2, 1962. At that time a prosecution identification witness, Mrs. Bertha Beatrice Woods, was observed exhibiting symptoms of defective vision. A Motion for Expert Witness Under Rule 28 with supporting affidavits, was filed immediately thereafter on the morning of October 3, 1962, by counsel for appellant seeking the appointment of an expert ophthalmologist to examine the visionary capacities of Mrs. Woods. (e.g. J.A.)

The motion for examination was forthwith presented to the court at the call of the case on October 3, 1962, before the Honorable Matthew F. McGuire who asked that it not be submitted there but be

submitted to the trial judge as "denied without prejudice in the circumstances of calling to the attention of the Trial Judge." (e.g. J.A.). There was no hearing or consideration.

The pending motion was again brought to the attention of the assigned trial judge, the Honorable Luther W. Youngdahl, (e.g. Tran. pp. 14-20) who also declined to hear or consider the motion. (e.g. Tran. pp. 14-20)

Appellant Edward G. Robinson and his co-defendant Enos Reid went to trial with what was then defined by the prosecutor (e.g. Trans. p. 145), and recognized by the court (e.g. Trans. 184) to be only a remaining question of identification. The happening of the robbery by someone and the presence of the appellant in the vicinity, with his co-defendant and two companions originally charged as defendants, was generally conceded by all parties.

With identification the conceded crux of the case, counsel for appellant Robinson was denied cross examination that bore upon the competency of the vision of the prosecution witness Woods (e.g. Tran. pp. 79-80), while the prosecutor in his closing argument to the jury argued the lack of fault in the eyes of the prosecution's identifying witness Woods. (e.g. Tran. 167)

Later in the closing argument, the prosecutor commented on the failure of the appellant to account for himself and his actions on the night of the robbery. (e.g. Tran. p. 169)

RULES INVOLVED

Rule 28 of the Federal Rules of Criminal Procedures, Expert Witnesses

The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by law. The parties also may call expert witness of their own selection.

STATEMENT OF POINTS

1. The mental examination given appellant concluded with a report framed in such bare legal conclusions as to the absence of mental disease or defect as to deny appellant the actual facts as to his mental condition, preclude him from developing any defense of insanity that might have existed, and to resolve the issue of criminal responsibility for all times.

2. The court erred in its denial of appellant's motion for the examination of a government identification witness for vision competency under Rule 28 of the Federal Rules of Criminal Procedure, without any consideration or hearing.

3. The court erred in limiting the cross-examination of this witness as to vision competency.

4. The prosecutor's argument as to the faultlessness of this witness's vision was prejudicial under the circumstances.

5. The prosecutor's closing argument to the jury on the failure of the defendant to account for his actions on the night of the robbery was prejudicial.

SUMMARY OF ARGUMENT

1. On order of the District Court, the Superintendent of Saint Elizabeth's Hospital filed a psychiatric report couched in such bare legal conclusions as to the absence of mental disease or defect in appellant that the issue of criminal responsibility was completely resolved by the experts. Defendant, with no redress available, was precluded from exploring whether a mental disease or defect did exist and from developing any defense on this basis that might in fact have been available.

2. The court erred in denying, without consideration or hearing, appellant's motion seeking the appointment of an expert witness to examine the vision competency of a prosecution identification witness (Rule 28, Federal Rules of Criminal Procedure).

3. The court erred in limiting cross-examination of this witness's vision competency.

4. The prosecutor's closing argument on the faultlessness of the vision of this witness was prejudicial under the circumstances.

5. The prosecutor's closing argument on the failure of the defendant to account for his actions on the night of the robbery with which he was charged was prejudicial in the circumstances of this case.

ARGUMENT

On prior occasions this Court has dealt with the problem of psychiatric opinion given on ultimate questions of criminal responsibility which should have been reserved for jury consideration during the trial of a criminal case. Carter v. United States, 102 U.S. App. D.C. 227, 252 F2d 608; McDonald v. United States, D.C. Cir., _____F2d_____, (No. 16,304 decided October 8, 1962); Hawkins v. United States, D.C. Cir., _____F2d_____, (No. 16,744 decided November 1, 1962).

In many different ways it has been stated that ad hoc definitions or conclusions by experts are not proper in explaining disease or defect--that the resolution of this question cannot be controlled by expert opinion.

What further control of the question by expert opinion could be found than in the instant case where through a bold legal conclusion in a pre-trial report to the Court the experts state in irrefutable fashion that there is no disease or defect. The question was resolved before it could be explored. And the defendant had no redress.

Additionally this Court has recognized that in most cases the accused does not possess the ability to seek psychiatric experts but must obtain examinations by psychiatrists employed in government institutions. Williams v. United States, 102 U.S. App. D.C. 51,250 F2d 19. And so it was in the instant case.

But where is any explanation about the dynamics of the

defendant's mental condition, where is any material from which the opinion is fashioned?

This Court has not yet said that a bare legal opinion on disease or defect standing alone is incompetent. Perhaps it has not had to so rule because in the cases so far considered the expert himself was actually available for examination on the dynamics of the defendant's mental condition. However it is submitted that the bare legal opinion offered in this case is incompetent. The defendant had no redress and was precluded from exploring whether a mental disease existed, if his act was a product and from presenting any defense to the charge that might in fact have existed on this ground. To hold otherwise is tantamount to allowing psychiatric experts to control the issue of criminal responsibility in any case by boldly concluding there is no disease or defect in written reports preliminary to trial.

When the psychiatrists pass on competency to stand trial the issue is in effect subject to judicial review as the trial progresses and the conduct and demeanor of the defendant is observed. When, as here, the psychiatrists pass on the absence of mental disease or defect in bare legal terms they are completely resolving the issue of criminal responsibility for all times.

Having been precluded from knowing the existence of or exploring a possible defense by reason of insanity, the defendant went to trial on the sole issue of identification.

Mrs. Bertha Beatrice Woods was one of the Government's witnesses who would identify appellant as one of the men she saw beating the complaining witness, Mr. George W. Lowery. In the witness room in the Court House on the day of the first call for trial, October 2, 1962, Mrs. Woods was observed exhibiting symptoms of defective vision though prior to the date of trial, upon questioning by appellant's counsel, she did not reveal there was any defect in her corrected vision. The trial did not begin on that day and motion for a vision test for this witness was promptly made, the appellant having no power to compel the examination without assistance from the Court and having no funds available for an expert. (e.g. J.A. _____). When it was brought to the attention of the Assignment Judge, the Honorable Matthew F. McGuire, on the following morning before trial had begun Judge McGuire asked that it not be submitted to him. When the request was made for presentation the motion was "denied without prejudice" in the circumstance of calling it to the attention of the Trial Judge. (e.g. Trans.). Here was denial without hearing, without consideration.

Though his motion was again presented to the Trial Judge, Honorable Luther M. Youngdahl, it was still not heard. (e.g. Tran. pp. 14-20).

The Court's power to order an examination of a witness on motion of the defendant has been recognized by this Court.

Carrado v. United States, 93 U.S. App. D.C. 183, 210 F2d 712, cert. den. 347 U.S. 1018, 74 S. Ct. 874, 98 L. Ed. 1140.

This power was recognized as the Federal Rules of Criminal Procedure were drafted and Rule 28 came into being. See Preliminary Draft of the Federal Rules of Criminal Procedure, United States Government Printing Office, 1943. Though the rule itself may appear to have been promulgated to protect the Court from being trapped in a battle of experts and to enable it to seek totally unbiased testimony, it is capable of much broader meaning. See United States v. Brodson, E.D. Wisconsin, 136 F. Supp. 158 (1955); United States v. Allied Stevedoring Corporation, S. D. N. Y., 138 F. Supp. 555 (1956); "Expert Witnesses in Federal Criminal Procedure," Lester B. Orfield, 20 FRD 317.

That Rule 28 "should be construed with the greatest liberality" has already been stated. United States v. Cancellieri, E.D. New York, 5 FRD 313 (1946).

But past these rather meager interpretations of a procedure whereby a defendant in a criminal case can secure the services of an expert witness one can find few guidelines. And there is no other procedure available to an indigent defendant beyond the inherent power of the court and its expansion in Rule 28 of the Federal Rules of Criminal Procedure.

Motions for expert witnesses have been made in the United States District Court for the District of Columbia with varying

results because there are no guidelines. (United States v. Charles X. Dunmore, D.C. D. C. No. 56-61; United States v. James Folsom, D.C. D. C. No. 502-62; United States v. Pleasant Burke, D.C. D. C. No. 376-62, pending U. S. App. D. C. No. 17,254).

It is not suggested that all of the prosecution witnesses should be examined for physical and mental fitness before their testimony is permitted at trial. Much should and must be left to the discretion of the trial court. But see Watson v. Cameron D.C. Cir., _____F2d_____, (No. 17,097 decided December 20, 1962).

But in the instant case the record does not even disclose an erercise of discretion--properly exercised or abused. There were only outright denials based on some hair splitting questions of where and before whom the motion should more properly be heard.

The contents of the motion were not frivolous nor was it presented for purposes of delay. An examination of the affidavits in support of the motion would so indicate. And where the only issue to be resolved at trial is one of identification and appellant proceeds under the only avenue available to him in refuting the testimony of an eye witness it should be considered, heard and granted. To ignore it completely is error. To hold otherwise might be permitting a conviction on the testimony of an incompetent eye witness.

For who is to say which juror did or did not rely on the testimony of Mrs. Woods in reaching a guilty verdict.

The competency of Mrs. Woods' vision of course became an issue at trial. Appellant, already precluded from having this competency expertly tested, explored that competency during cross-examination (e.g. Tran. 74-89). He was precluded again in several instances (e.g. Tran. 79, 80) from developing a visionary incompetency and not allowed to even question the witness or her ability to distinguish the appellant from any other person. (e.g. Tran. 84). And despite the appellant's preclusion from expert examination and cross-examination as to the vision competency of Mrs. Woods the prosecution in his closing rebuttal argued a lack of fault in the witness's ability to see. (e.g. Tran. 167).

Stripped of defenses that had been properly attempted by appellant he then found himself the subject of the prosecutor's comment on his failure to account for himself on the night of the robbery. Defendants had not taken the stand for reasons, right or wrong, that were deemed "trial strategy."

The line between fair and unfair comment in the prosecutor's argument is sometimes difficult to draw. But certainly in this context the remarks were so prejudicial as to require a new trial. See Bernard Smith v. United States, D.C. Cir., _____F2d_____, (No. 16,913 decided December 13, 1962).

Another point is deserving of mention. The testimony of a cab driver was one essential part of the Government's case, police work in the matter amounting to nil. On voir dire Prospective Juror Padgett revealed that she had a brother who had driven a cab for twenty or twenty five years and Prospective Juror Curl revealed that she had a husband who had been driving a cab for about three years. Prospective Juror Padgett believed "she could treat a cab driver's testimony in unbiased fashion;" Prospective Juror Curl stated that she"could treat another cab driver's testimony in an unbiased way." (e.g. Trans. 10-11). Both of these jurors were selected for jury duty. Admittedly there was no request for an excuse for cause, and no strike exercised.

But in considering the preclusion of appellant's defenses, the unresolved question of vision competency which was finally argued as faultless by the Government, the Government's argument on appellant's failure to account for himself and thus defend, and the presence of two out of twelve jurors with predilections in antipathy to appellant it is submitted that the tenure of this trial from its opening to its closing was such as to require reversal for a new trial.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the brief has been served upon the United States Attorney on the _____ _____ day of January, 1963, by personally handing a copy to Mildred Wall, United States Attorney's Office.

_____

Kitty Blair Frank

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17455

EDWARD G. ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ARTHUR J. McLAUGHLIN,
WILLIAM C. PRYOR,
Assistant United States Attorneys.

QUESTIONS PRESENTED

In the opinion of the appellee, the following questions are presented:

1. Where appellant was examined at Saint Elizabeths Hospital prior to trial in a prosecution for robbery and found without mental disease, can it reasonably be said that appellant, in preparation for trial, was limited to the four corners of the hospital's report and thus precluded from raising the question of insanity?

2. (a) Was there abuse of discretion by the Court in denial of appellant's motion, filed on the day of trial, for appointment of an expert to examine the vision of a witness for the prosecution?

(b) Where questioning was extensive, and virtually without objection, did not appellant's counsel have full opportunity to examine the witness with regard to all matters including her vision?

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17455

EDWARD G. ROBINSON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from a judgment of conviction for robbery (22 D.C.C. 2901). After indictment (J.A. 1) on January 29, 1962, appellant was tried by jury and found guilty (J.A. 34). By judgment and commitment filed November 9, 1962 (J.A. 35), he was sentenced to a term of one to three years imprisonment. Application to proceed on appeal in forma pauperis was granted by the District Court. This appeal followed.

Prior to trial, the court, on April 30, 1962, ordered appellant temporarily committed to Saint Elizabeths Hospital for mental examination pursuant to provisions of 24 D.C.C. 301(a) (J.A. 2). Admission to the hospital was on the same date. In response to the Order, it was reported on July 26, 1962, after eighty-seven days of observation and examination, that members of the staff found no mental disease or defect during the period of examination or at the time of the offense. It was further stated that appellant was mentally competent to under-

stand the proceedings against him and able to consult with counsel (J.A. 3).

The case was called for trial on October 3, 1962, at which time appellant's counsel requested appointment of a physician to examine the vision of a prosecution witness, Mrs. Beatrice Woods. The motion was denied without prejudice to be raised again before the trial court (J.A. 4A). This was done. After discussion at the bench, the motion was denied (J.A. 4–7). Thereupon, the trial commenced without further request by appellant for this extraordinary procedural step.

Mr. George W. Lowry, the complainant, stated he was walking alone, shortly after midnight, on January 13, 1962 in the vicinity of 18th and T Streets, Northwest, and was attacked from the rear by two or three persons. As he was knocked to the ground and beaten, he shouted for help. A pocket containing one hundred fifteen dollars was cut from his trousers (Tr. 24–27). The witness identified appellant shortly after the incident and at trial (Tr. 27, 28).

Mrs. Beatrice Woods testified that during the early hours of the same date she heard a "blood-curdling" scream (Tr. 69), outside of her residence; she went to her porch to investigate and saw two men attacking a man later identified as the complainant. One of the attackers fled immediately. Within seconds a taxi appeared; the operator, Mr. Lester Groom, stopped to render assistance causing the other man to run (Tr. 70). At trial, Mrs. Wood positively identified appellant as one of the wrongdoers (Tr. 70). She stated she had also recognized him on another occasion (Tr. 71).

Examination of police officer, Thomas P. Britsche, and Mr. Groom, operator of the taxi, revealed that Officer Britsche and a fellow officer heard a scream from the vicinity of 18th and T Streets and moved in that direction on foot (Tr. 123–125). Enroute they met Mr. Groom and were driven by him to a location where appellant had been followed by Mr. Groom. Appellant and three persons in his company were arrested (Tr. 114, 115). Mr. Groom also identified appellant (Tr. 92, 93).

Cross examination of Mrs. Wood was extensive with emphasis given to the condition of her eyes. She was asked to locate items on a map, though counsel stated. "This is not a vision

test, Your Honor" (J.A. 8). The prosecutor made but one objection to the form of the questions propounded. Significantly, the Court sustained the objection stating, "you can question her concerning her eyesight. I won't limit you on that, but this question is argumentative" (J.A. 11). No other restriction was imposed by the Court.

At the conclusion of the evidence, appellant supplying no defense, the prosecutor, in argument, summarized the pertinent facts. His sole reference to witness Woods was brief:

> In addition to the identification by Mr. Lowry of defendant Robinson we have Mrs. Woods who testified that her attention was attracted to this robbery by these ungodly, I believe she said, screams, and that she observed the defendant Robinson. She identified him before you here yesterday * * * Now, is she being honest in her identification? Did she have the opportunity to see these people? From the testimony in this case was the lighting conditions in that immediate vicinity sufficient for *them* to see what *they* told you *they* saw? [Emphasis supplied.] (J.A. 13–14)

Appellant's counsel strenuously argued the testimony was incredible and without corroboration. He found the complainant to be "a bloody mess" and "* * * probably considerably drunker than he'd like you to believe" (J.A. 16). In his view, Mrs. Woods saw little, if anything (J.A. 17), the taxi driver's behavior was deemed bizarre and unreliable (J.A. 19, 20). In rebuttal, the prosecutor answered these contentions directly. Alluding to each witness in order, he commented upon the testimony given:

> * * * My friend says, Well being found in the immediate vicinity should not be considered corroboration by you. Now, ladies and gentlemen of the jury, this is the wee hours of the morning. We accounted for where Mr. Lowry was coming from. Where were defendants coming from? What were they doing in that immediate vicinity at that time? Were they at that pool room? (J.A. 23)

At the close of argument, counsel requested a mistrial stating, as grounds, that the prosecutor "tended to come very close to commenting on the failure of the defense to put on a case, [it] tended too closely to putting the burden on the defendants to take the stand" (J.A. 24). Upon denial of the motion counsel requested that the court not give an instruction relating to appellant's failure to testify (J.A. 24). The jury was instructed and thereafter returned a verdict of guilty.

STATUTE AND RULES INVOLVED

Title 22, District of Columbia Code, Section 2901 provides:

> Whoever by force or violence, whether against resistance or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more that fifteen years.

Rule 28, Federal Rules of Criminal Procedure provides:

> The court may order the defendant or the government or both to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witness agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act. A witness so appointed shall be informed of his duties by the court at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of his findings, if any, and may thereafter be called to testify by the court or by any party. He shall be subject to cross-examination by each party. The court may determine the reasonable compensation of such a witness and directs its payment out of such funds as may be provided by law. The parties also may call expert witnesses of their own selection.

Rule 17(c), Federal Rules of Criminal Procedure provides:

> A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys.

SUMMARY OF ARGUMENT

I

The report of mental examination submitted by St. Elizabeth's Hospital to the Court was proper and did not hinder or preclude appellant's preparation for trial.

II

a. There was no abuse of discretion in denial of the motion seeking appointment of a physician to examine the vision of a witness for the prosecution.

b. Appellant's counsel was afforded full opportunity to examine the witness with respect to vision.

ARGUMENT

I. The report of mental examination was proper and did not hinder appellant's preparation for trial

The report of mental examination serves an administrative purpose. It is simply a statement of medical opinion submitted by the Superintendent in response to Court order. It is not evidence. See 18 U.S.C. 4244; *Lyles* v. *United States*, 105 U.S. App. D.C. 22, 38, 254 F. 2d 725, 730 (1957). Rather it is intended to answer the specific questions propounded (J.A. 2) and additionally, to advise the Court that the examination and observation have been concluded.

Certainly it cannot reasonably be said that this document, standing alone, purports to be dispositive of the question of mental disease at trial. Appellant's counsel is free, well in advance of trial, to scrutinize the basis for the report. In this case, as in other similar cases, counsel could have interviewed members of the hospital staff who were directly concerned with appellant. Further, he could have utilized Rule 17(c), Fed. Crim P. to obtain the official hospital records for his own inspection.

In essence appellant's contention is administrative in nature and is directed to the form of the report. It is clear that the Hospital's report was not prejudicial to appellant's position at trial and equally clear that full discovery was available to his attorney.

II

A. There was no abuse of discretion in denial of appellant's belated motion

The procedure which appellant's counsel sought to invoke, pursuant to Rule 28, Fed. R. Crim. P., was extraordinary in scope but noticeably lacking in factual support. The language of the Rule and cases noted in discussion of it [1] emphasize the familiar principle that the function of an expert is to aid the court and jury to resolve questions where lay knowledge is inadequate. In this vein, Rule 28 has been sparingly applied. Certainly, the burdensome request for eye examination of Mrs. Woods was well beyond the customary usage. Inversely, the only facts alleged in support of the motion were casual observations by appellant and a friend in the courthouse on the day prior to trial.

When one considers the nature of the rule invoked, the alternative of cross-examination, (which was exhaustive) the marginal content and tardiness of the motion, the Court did not abuse its discretion in denying the request. Indeed, the question raised was one which the jury on the basis of its collective experience could readily decide. The proper way to test evi-

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[1] "Expert Witnesses In Federal Criminal Procedure," Lester B. Orfield, 20 F.R.D. 317.

dence given by the witness was the conventional and time-honored method of cross-examination.

It is true that counsel did not have an opportunity to present an oral argument in support of his request. Nonetheless, the record reveals the Court fully understood the nature of the motion being urged upon it (J.A. 6–7). In denying the motion there was no abuse of discretion.

B. Appellant's counsel was afforded full opportunity to examine the witness with respect to vision

The cross-examination of Mrs. Woods was lengthy,[2] almost without objection, and concluded only when counsel determined he had no further questions.

During the entire period of counsel's examination, there were but two interruptions: an objection to the form of a question (J.A. 11) and a request that a map be presented directly to the witness (J.A. 8). Understandably, counsel at no time expressed the view that the examination was being curtailed. It is significant that the witness was never asked about her ability to see and read printed material, which was a ground relied upon in the motion pursuant to Rule 28.

It is, of course, clear that the extent of cross-examination is within the discretion of the Court. *Wright* v. *United States*, 87 U.S. App. D.C. 67, 183 F. 2d 821 (1950); *Collazo* v. *United States*, 90 U.S. App. D.C. 241, 196 F. 2d 573 (1952). *Alexander* v. *United States*, 134 A. 2d 485 (1957). In this case it is submitted that we do not reach the question of exercise of discretion by the court. As stated in the *Alexander* case, *supra*:

> "* * * This is far from supporting the claim that the judge erroneously limited the scope of cross-examination; it merely halted further questioning along argumentative and repetitive lines."

It is difficult to conceive of a more unlimited examination, within the rules of evidence, than was afforded here.

We note, in passing, appellant's weak contention that the District Court abused its discretion in refusing a motion for

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[2] There were seventeen pages of transcript; at least fourteen specific questions related to vision. (Tr. 72–89)

mistrial predicated on the assertion of prejudicial statements by the prosecutor. The Court properly ruled on the propriety of the argument. It was fair rebuttal comment based on inferences logically available from the uncontradicted facts. *Jamil et al.* v. *United States*, 55 F. 2d 217 (5th Cir. 1932); *Cf. Clemmons* v. *United States*, No. 17241, — U.S. App. D.C. —, — F. 2d — (1963).

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.
FRANK Q. NEBEKER,
ARTHUR J. MCLAUGHLIN,
WILLIAM C. PRYOR,
Assistant United States Attorneys.

U.S. GOVERNMENT PRINTING OFFICE: 1963

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,455

EDWARD G. ROBINSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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3. Order for mental examination (April 30, 1962).
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12. Statement of Docket Entries (December 4, 1962).

JOINT APPENDIX

[Filed January 29, 1962]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Impanelled on December 21, 1961, Sworn in on January 2, 1962.

THE UNITED STATES OF AMERICA	)	Criminal No. 94-62
	)	
vs.	)	Grand Jury No. 60-62
	)	
EDWARD G. ROBINSON ENOS W. REID	)	Robbery (22-2901 D.C. Code)

The Grand Jury charges:

On or about January 13, 1962, within the District of Columbia, Edward G. Robinson and Enos W. Reid by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the person and from the immediate actual possession of George W. Lowry property of George W. Lowry of the value of about $115.00 consisting of the following: $115.00 in money.

/s/ David E. Acheson
Attorney of the United States
in and for the District of Columbia.

A TRUE BILL:

[Filed February 2, 1962]

PLEA OF DEFENDANT

On this 2nd day of February, 1962, the defendants (1) Edward G. Robinson and (2) Enos W. Reid, appearing in proper person and each without counsel, being arraigned in open Court upon the indictment, the substance of the charge being stated to him, each pleads not guilty thereto.

The defendants are remanded to the District Jail.

By direction of

/s/ MATTHEW F. McGUIRE
Presiding Judge
Criminal Court # ASSIGNMENT

* * *

* * *

[Filed April 30, 1962]

ORDER

[Edward G. Robinson]

Upon consideration of the motion by defendant, for an examination of the mental competency of the defendant, pursuant to Title 24, Section 301, of the District of Columbia Code, as amended August 9, 1955, and the representati ns made in support thereof, it is this 30 day of April, 1962,

ORDERED, that the defendant be and he is hereby committed to Saint Elizabeths Hospital for a period not to exceed ninety (90) days for examination by the psychiatric staff of that hospital and that after such examination a report be made to this Court as to:

(1) Whether the defendant is presently so mentally incompetent as to be unable to understand the proceedings against him or to properly assist in the preparation of his defense herein; and

(2) Whether the defendant, at the time of the alleged criminal offense, committed on or about January 13, 1962, was suffering from a mental disease, or defect, and if so, whether his criminal act was the product of his mental condition; and it is

FURTHERED ORDERED, that in the event there is no bed immediately available at Saint Elizabeths Hospital the defendant remain in the District of Columbia Jail to await transfer to Saint Elizabeths Hospital when a bed becomes available, and it is

FURTHERED ORDERED, that upon receipt by the Court of the report of the Superintendent of that hospital, the United States Marshal, or his designated deputy, is hereby authorized to bring the defendant, Edward G. Robinson before this Court for such further proceedings in this matter as may be necessary, or, in the event the hospital report indicates that the defendant is competent to stand trial, the United States Marshal, or his designated deputy, is hereby authorized to transport the defendant to the District of Columbia Jail to await further action of this Court.

/s/ MATTHEW McGUIRE, Judge

Richard Aren: Attorney for Deft.

John E. : Asst. United States Attorney

[Filed July 28, 1962]

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE

SAINT ELIZABETHS HOSPITAL
Washington 20, D. C.

In Reply Refer to:JHP/MNP
Edward G. Robinson

July 26, 1962

The Clerk
Criminal Division
United States District Court
for the District of Columbia
United States Courthouse
Washington 1, D.C.

Dear Sir:

Mr. Edward G. Robinson (Criminal Number 94-62) was committed to Saint Elizabeths Hospital on April 30, 1962, for a period not to exceed ninety days, upon an order signed by Judge Matthew F. McGuire, to be examined by the psychiatric staff of this hospital. It was further ordered that a written report be submitted to the Court regarding the patient's present mental condition, mental competency for trial, mental condition on or about January 13, 1962, and causal connection between the mental disease or defect, if present, and the alleged criminal act.

Mr. Robinson's case has been studied since the date of his admission to Saint Elizabeths Hospital and he has been examined by qualified psychiatrists of the medical staff of this hospital as to his mental condition. On July 20, 1962, Mr. Robinson was examined and his case reviewed in detail at a medical staff conference. As a result of our examinations and observation, it is our opinion that Mr. Robinson is mentally competent to understand the nature of the proceedings against him and to consult properly with counsel in his own defense. We find no mental disease or defect existing at the present time nor on or about January 13, 1962.

Sincerely yours,

/s/ Winfred Overholser, M.D.
Superintendent

Enclosure
cc: United States Attorney
for the District of Columbia

United States Marshal

TRANSCRIPT OF PROCEEDINGS

Washington, D.C.
October 3, 1962

The above-entitled matter came on for assignment before the Honorable MATTHEW F. McGUIRE, Chief Judge, at 9:30 o'clock a.m.

* * * * *

PROCEEDINGS

THE DEPUTY CLERK: Edward G. Robinson; Criminal No. 94-62.

MR. McLAUGHLIN: The government is ready.

MR. GARVIS: The defense is ready subject to the disposition of a motion which will be presented as a preliminary matter this morning.

THE COURT: That is not the way things are done. What is this preliminary motion which has to be heard this morning when the case is set for trial?

MR. GARVIS: The motion is based on grounds which were not available until yesterday afternoon.

THE COURT: What grounds did you discover that were not available until yesterday afternoon and that are available this morning when you present this motion? I do not want to be captious with you but the

whole purpose of this colloquy we are having is that we have a Judge ready to perform his function in the trial of this case unless it is something catastrophic - -

MR. GARVIS: May I submit the motion?

THE COURT: Do not submit the motion. Tell me what the motion is.

MR. GARVIS: The motion is for expert witnesses under Rule 28 which probably would not delay the case at all.

3 THE COURT: If it won't delay the case, present it to Judge Youngdahl.

MR. GARVIS: May I present this as a preliminary matter before Your Honor?

THE COURT: You want me to rule on it. It is denied without prejudice in the circumstance of calling it to the attention of the Trial Judge.

MR. GARVIS: May this be put in the trial jacket?

THE COURT: Judge Youngdahl.

[Filed December 12, 1962]

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1 Washington, D.C.
Wednesday, Oct. 3, 1962

The above-styled cause came on for hearing before the HONORABLE LUTHER W. YOUNGDAHL, United States District Judge, and a jury, at approximately 10:45 o'clock a.m.

APPEARANCES:

On behalf of the Government:

ARTHUR J. McLAUGHLIN,
Assistant United States Attorney

On behalf of Defendant Robinson:

MARVIN J. GARBIS, Esq.

On behalf of Defendant Reid:

WILLIAM A. TINNEY, JR., Esq.

* * * * *

14 MR. GARBIS: Your Honor, may we approach the bench, please?

THE COURT: Yes.

(AT THE BENCH:)

MR. GARBIS: Your Honor at the Assignment Court the defense for Robinson, and Mr. Tinney also agreed, presented a motion for determination on Rule 28, which motion I believe --

THE COURT: I hear no motions when you announce ready for trial before the Chief Judge, that means you are ready. I will not hear any motion.

MR. GARBIS: Your Honor, may I state this, please: That I stated to Judge McGuire that I announced ready subject to the motion.

15 THE COURT: It isn't ready subject to anything before me. Either it is ready or it is not ready. Motions should be heard on the Friday calendar. I took it up with Judge McGuire a week ago and he agreed with me that the motions should be heard on the Friday calendar, and obviously one of the reasons is if I hear a motion and it will take the Government's case away completely, we have jurors sitting around here and that's the

reason we have these motion calendars. You should have set the motion down for Friday's calendar to be heard.

MR. GARBIS: Your Honor, may I state the grounds for the motion did not arise to my knowledge until yesterday afternoon.

THE COURT: Then you should have said to the Court you were not ready this morning. You should have said to the Chief Judge you were not ready and it was for him to decide, to determine whether you were ready or not. As long as there was a motion pending you were not ready.

MR. GARBIS: It is Your Honor's decision when I stated, as I believe I did, ready subject to this motion --

THE COURT: There is no such thing in my opinion as ready subject, you are either ready or not ready. As long as a motion is pending under our system here, you are not ready. If there was any merit to your position, and the thing came up so suddenly that your motion should be heard, it's up to the Chief Judge to determine that at the call of the calendar.

As I say, I took it up with him a week ago and he agreed with me on it. That is why we have these Friday calendars.

MR. McLAUGHLIN: He denied the motion without prejudice, didn't he?

MR. GARBIS: Yes, he denied it without prejudice.

THE COURT: As long as he denied it, that takes care of it.

MR. GARBIS: He did state, his words were: Denied without prejudice so you take it up with the trial Judge.

THE COURT: As long as he heard it it will stand denied and I will consider the matter as if you had announced ready before the Chief Judge.

MR. GARBIS: Your Honor, may I state this: I said I have a motion for an expert witness under Rule 28. Judge McGuire did not even look at the motion to see what it was.

THE COURT: You are stating something in the record that I don't know anything about, whether he looked at the motion. He passed on the motion, he denied it; and that takes care of it as far as I am concerned.

By the way, let me ask you a question. Is there going to be a plea of insanity in this case?

17 MR. GARBIS: No, Your Honor.

THE COURT: By either defendant?

MR. TINNEY: No, Your Honor.

THE COURT: One of these men had been committed to St. Elizabeths.

MR. GARBIS: I don't understand why that happened.

THE COURT: The reason I ask you, whenever there is a plea of insanity I ask on voir dire if any member of the panel is prejudiced against such a plea, and I just hadn't looked at the jacket and I wanted to be sure.

There will be no plea of insanity in this case?

MR. GARBIS: No, Your Honor.

THE COURT: What was this expert witness you were talking about?

MR. GARBIS: An opthalmologist, Your Honor, an eye doctor for either the purpose of testing this woman's eyes, or else having her submit to some sort of eye chart test.

THE COURT: What woman?

MR. GARBIS: The woman that is the identification witness, Your Honor. She was sitting in the courtroom.

THE COURT: Is she the one that was intoxicated?

MR. McLAUGHLIN: That was the mother of one of the defendants,

18 Your Honor.

MR. GARBIS: She is not a witness.

THE COURT: She can testify; is she your witness?

MR. GARBIS: No, Your Honor, she is Mr. McLaughlin's witness.

THE COURT: These defendants are out on bond, and if they have the money to raise bond I think they could secure an eye examination. It costs $15.

MR. GARBIS: An eye examination for her, Your Honor.

THE COURT: It costs $15 to secure an eye examination.

MR. GARBIS: They couldn't get her to submit to an eye examination.

THE COURT: They couldn't?

MR. McLAUGHLIN: What he wants, Your Honor, is this: This

case was set for yesterday, called for yesterday. And these witnesses were out in the witness room. So he's come along today and filed an affidavit from the defendant and another witness who was arrested at the time with the defendants saying that they observed this woman in the witness room and she had difficulty reading the signs, and therefore, they want her to be examined by an eye doctor.

THE COURT: Anyway, the Chief Judge heard the motion and denied it so we will proceed with the case. After this, I would like to suggest if you have any other cases, that you do not announce ready before the Chief Judge, there is no such thing as "ready, if," or "ready on condition," there are no such things as that. You are either ready or not ready.

We have jurors sitting around here. As I say, that is the reason we have these Friday motion calendars. With our responsibility to clear the Jail of these cases, we have quite a problem. Also, there is a shortage on the Staff of the U. S. Attorney's Office.

We can't have these motions come before the trial judge delaying the trying of the cases, and have these jurors sitting around. I had a situation recently where there was a motion to suppress. I had to hear it right at the time of the trial. It threw out the Government's case. Jurors were sitting around waiting. That is obviously the reason we have the Friday motions calendar, to hear these motions.

Now I recognize there may be some emergency situations arise suddenly just prior to the call of the case. If such be the case, it is the responsibility of the Chief Judge, or whoever has the call of the calendar to determine whether there is merit to it, and if there is, the case should be continued until the motion is heard on the Friday calendar.

I had a conference with the Chief Judge, as I say, about a week ago, and he agreed with me on it, and that is the reason why I am taking this position.

* * * * *

68 BERTHA BEATRICE WOODS

was called as a witness on behalf of the Government, was duly sworn, was examined, and testified as follows:

* * * * *

72 CROSS EXAMINATION

BY MR. GARBIS:

* * * * *

79 Q. Can you see the map clearly, Mrs. Woods? A. Yes, I can.

Q. Mrs. Woods, do you see the place marked "Y" on this map, on T Street? A. "Y"?

Q. Yes, the letter "Y".

MR. McLAUGHLIN: Let's be fair about this.

THE WITNESS: I see something on my left.

MR. McLAUGHLIN: Wait a minute. Let's be fair about this, Your Honor. I can't see the "Y" myself. Let her get close to the board.

THE WITNESS: I'm going to tell him --

MR. McLAUGHLIN: Wait a minute. Let's be fair about this.

MR. GARBIS: This is not a vision test, Your Honor.

THE COURT: If you wish to ask her to locate different places on the map, I think you better ask questions.

MR. McLAUGHLIN: At least let her come down close to the board.

80 THE COURT: I think you better be fair about this.

BY MR. GARBIS:

Q. Would you like to get near the map, Mrs. Woods?

THE COURT: Ask your questions from there.

BY MR. GARBIS:

Q. Can you tell me where your house is? Is your house in the block marked 151, between T and Willard Street? A. I don't see it. I see Willard and Swann Street.

Q. Do you see the pointer pointing to the letter T, Mrs. Woods? A. I see it.

Q. This is T Street, the street to which I'm pointing now, between 18th and 17th. Your house would be somewhere along this line of houses,

would it not? A. Well, with T Street going south, or east and west, my house would be to the left of that T there.

Q. Yes. How close to the corner is your house? A. It's the second house from the corner.

Q. About how many feet would you guess? A. I don't know. I suppose the lots are 150 feet lots, so I imagine it would be a little more than 50 feet.

Q. If I put my pointer at the point where it is now, would that re-
81 present where your house is or would it be moved to a different place?

THE COURT: This isn't drawn to scale, is it?

MR. GARBIS: I can't represent that, Your Honor, no.

THE COURT: Roughly she has indicated and isn't it sufficient identification for her to indicate that her house is the second house from the corner and the lots are 150 feet wide?

MR. GARBIS: Yes, Your Honor.

BY MR. GARBIS:

Q. So that's two houses from the corner? A. My house is the second house from the corner; I'm '75.

Q. Yes ma'am, on T Street near 18th; is that correct? A. Yes.

Q. You came out. Where was the lamp-post? A. The lamp-post?

Q. Yes. A. Lamp-post, one was on the left and one was on the right, one was on the left right near '75, 1775.

Q. Was that a new lamp-post? A. No, that's the same one been there all the time. The other one was on the right at 18th and T, the southeast corner of 18th and T.

82 Q. Near the whiskey store? A. Yes. At the corner of the lot, the parking lot.

Q. Wasn't the lighting poor at that time? A. No, it was as bright as it always had been.

Q. Isn't it a fact that new lights were installed after that? A. That's right.

Q. Where was the new lighting? A. They were already installed

but hadn't turned them on. They were still using the stationary ones that were straight up and down, not the ones that went over the street.

Q. It was a dark night, was it not? A. As dark as it would always be.

Q. How far were the people who were beating on this man from you when you came out of the house? A. I don't know. It was the distance from my front step to the sidewalk, to the curb of the sidewalk, and I haven't measured that.

Q. Would that be farther than you are from me, or closer? A. It would probably be a little farther because had I gone down to the curb I would have had to go down and then out to the curb.

83 Q. Would it be as far as we are now, Mrs. Woods? A. Approximately. I'm not measuring the exact inches and feet.

Q. Would you estimate this distance as roughly forty feet, or would Mr. McLaughlin care to estimate?

Would you call this forty feet? A. Forty feet?

Q. Yes, between us.

THE COURT: Why don't you estimate it and see how accurate you are.

THE WITNESS: I don't know.

BY MR. GARBIS:

Q. My estimate would be forty feet. What would your estimate be? A. I don't know.

Q. You stated that you saw and identified this boy Robinson; is that correct? A. Yes, I did.

Q. Did you see whether he had a mustache or not? A. No, I didn't.

Q. Did you get a good clear look at his face for a long time?

84 A. No, I didn't get a good long clear look at his face for a long time because he wasn't out there a long time.

Q. About how long were you out there? A. Well, I don't know.

Q. How strong are your glasses, Mrs. Woods? A. I don't know that.

Q. If you had been shown or if you were shown a person similar to

this boy, would you be able to distinguish the two and say which was the one who committed the crime?

MR. McLAUGHLIN: I object to this, if Your Honor please.

THE COURT: Argumentative; sustained.

THE WITNESS: He asked me that twice before.

THE COURT: Sustained.

You can question her concerning her eyesight. I won't limit you on that, but this question is argumentative.

* * * * *

[Filed October 3, 1962]

MOTION FOR EXPERT WITNESS UNDER RULE 28

Comes now the defendant, Edward G. Robinson, by his counsel, appointed by this Court, and moves the Court to appoint an expert ophthalmologist pursuant to Rule 28 of the Federal Rules of Criminal Procedure, said expert to test the vision with and without glasses, particularly as to night vision, of Mrs. Beatrice Woods, a prosecution identification witness, and to testify as to the results of said examination. As a basis for said motion, defendant Robinson urges the following reasons:

1. Mrs. Woods is the strongest prosecution identification witness.

2. Her view of the alleged crime was at night under poor lighting conditions.

3. Prior to the date of trial Mrs. Woods was asked by defense counsel, about her corrected vision and she did not reveal any defect.

4. In the Witness Room in the Courthouse on the day of trial, October 2, 1962, Mrs. Woods was observed exhibiting symptoms of defective vision which are set out in the affidavits accompanying this motion.

Wherefore, defendant Robinson requests the appointment of an expert ophthalmologist pursuant to Rule 28 to examine the vision with and without glasses of Mrs. Beatrice Woods.

Respectfully submitted,

/s/ Marvin Garbis, * * *
Appointed by this Court

(SEAL)

[Certificate of Service]

[Filed Oct. 3, 1962]

AFFIDAVIT IN SUPPORT OF MOTION
FOR EXPERT WITNESS UNDER RULE 28

I do hereby swear and depose that the following facts are true:

1. On October 2, 1962 I was in the Criminal Witness Room of the United States District Court in Washington, D.C.

2. I observed Mrs. Beatrice Wood wearing a pair of clear glasses plus a pair of dark green lenses over the clear glasses.

3. I observed Mrs. Wood reading a newspaper for a period in excess of twenty minutes, during which period she held the paper less than six inches from her eyes while wearing the two sets of lenses described above.

4. I observed Mrs. Woods looking for the Witness Room at about 1:30 P.M. She had to get so close to the room sign that her glasses were almost touching the sign before she could read it. She was at this time wearing two sets of lenses.

5. I observed Mrs. Wood look at a large sign in the Witness Room telling people that one should not eat in the room. Mrs. Wood had to get within six to eight inches of the sign before she could read it. She had one set of lenses on at this time.

6. I haven't funds for said expert.

/s/ Edward G. Robinson

/s/ Enos W. Reid

[Filed Oct. 3, 1962]

AFFIDAVIT IN SUPPORT OF MOTION FOR EXPERT WITNESS UNDER RULE 28

I do hereby swear and depose that the following facts are true:

1. On October 2, 1962 in the Criminal Witness Room of the United States Courthouse in Washington, D. C. I observed Mrs. Beatrice Wood. Mrs. Wood was walking around the room wearing glasses with dark green lenses apparently clipped over clear lenses.

2. I observed Mrs. Wood in the Criminal Witness Room sitting with a pair of glasses on which had only clear lenses.

3. On July 28, 1962 I interviewed Mrs. Wood at her home. During the course of the interview I asked her whether her corrected vision was 20/20. Mrs. Wood did not reveal that there was any defect in her corrected vision.

4. I exercised due diligence in the investigation of this case to the best of my knowledge.

5. Prior to October 2, 1962 I had no knowledge that Mrs. Wood's corrected vision might be defective.

6. The accompanying Motion was prepared as soon as could reasonably be done after obtaining the information in the affidavits submitted therewith.

/s/ Marvin J. Garbis

Counsel for Robinson, Defendant
Appointed by this Court

[Filed Oct. 3, 1962]

AFFIDAVIT IN SUPPORT OF MOTION FOR EXPERT WITNESS UNDER RULE 28

I do hereby swear and depose that the following facts are true:

1. On October 2, 1962 I was in the Criminal Witness Room of the United States District Court in Washington, D. C.

2. I observed Mrs. Beatrice Wood wearing several different pairs of glasses, and on several occasions wearing a set of clear lenses plus a set of dark green lenses.

3. I observed Mrs. Wood reading a newspaper for a period in excess of twenty minutes, during which period she held the paper less than six inches from her eye while wearing the two sets of lenses described above.

4. I observed Mrs. Wood looking for the Witness Room at about 1:30 P.M. She had to get so close to the room sign that her glasses

were almost touching it before she could read it. She was at this time wearing two sets of lenses.

5. I observed Mrs. Wood look at a large sign in the Witness Room. The sign told people not to eat in the room. Mrs. Wood, wearing two sets of lenses, had to get within six to eight inches of the sign before she could read it.

/s/ William Hinkle

/s/ Joyce M. Robinson

[Filed October 3, 1962]

On this 3rd day of October, 1962, came the attorney of the United States; the defendants, No. 1: Edward G. Robinson, No. 2: Enos W. Reid, in proper person and by their attorneys, No. 1: Marvin Garbis, No. 2: William A. Tinney, Jr., Esquires; whereupon the jurors of the regular Petit Jury panel serving in Criminal Court No. Three, being called, are sworn upon their voir dire; and thereupon comes a jury of good and lawful persons of the District of Columbia, to-wit:

1. Mrs. Juanetta F. Curl
2. Harrison D. Jacobs
3. Addison S. Bomberger
4. Clifton Johnson
5. Mrs. Katherine M. Johnson
6. Mrs. Grace E. Woodard
7. Mrs. Virginia S. Boyce
8. Alvin N. Bridges

9. Mrs. Viola M. Padgett

10. Walter J. Braxton

11. Sidney Gershben

12. Mrs. Gertrude E. Schroeder

who are sworn to well and truly try the issue joined herein; whereupon the Court directs the calling of two persons to serve as alternate jurors, and Willie S. Short and Leonard Gorin being called, are sworn to well and truly try the issue joined herein; and thereupon after part of the evidence having been heard, the case is respited until 10:00 A.M. tomorrow morning.

The defendants are allowed to remain on bond.

By direction of

/s/ LUTHER W. YOUNGDAHL

Presiding Judge
Criminal Court #THREE

* * * * * *

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140 Washington, D.C.
Thursday, Oct. 4, 1962.

* * * * *

145 CLOSING ARGUMENT ON BEHALF OF THE GOVERNMENT,

BY MR. McLAUGHLIN:

If it please the Court, and you ladies and gentlemen of the jury:

In my opening statement I told you what the Government intended to prove and you had an opportunity to see and hear the witnesses to satisfy yourselves as to the guilt or innocence of these defendants.

I don't believe it is disputed by anyone that on January 13th, about 12:30 or 12:50 in the morning, that Mr. Lowry was robbed by someone or some people. I don't believe it has been disputed that in the course of that robbery that he received a severe beating from his own testimony he tells you as to the bruises about his body, and I believe he also testified that two or three teeth were knocked out.

Now the question boils down to one issue in this particular case, and that is what we call identification. You heard Mr. Lowry testify, and you heard him in his testimony, and he identified the Defendant Robinson. He said Robinson was the last one to leave and that Robinson was the first one, I believe he testified, that struck him; that when he went

146 to the ground this other man struck him too.

And then he tells you that his pocket was cut and his monies taken. Now did he have an opportunity to observe these men? Is he being honest with you when he identifies the Defendant Robinson? Was Robinson in that immediate vicinity about that time? Was he with the co-defendant on or about that time?

Ladies and gentlemen of the jury, within a few minutes after this robbery the defendants are apprehended by the police a short distance from where this robbery took place.

In addition to the identification by Mr. Lowry of Defendant Robinson we have Mrs. Woods who testified that her attention was attracted to this robbery by these ungodly, I believe she said, screams, and that she observed the Defendant Robinson. She identified him before you here

yesterday.

As far as the Defendant Reid, she said the only way she could identify him was by his dress that she wasn't positive.

Now, is she being honest in her identification? Did she have the opportunity to see these people? From the testimony in this case was the lighting conditions in that immediate vicinity sufficient for them to see what they told you they saw?

147 Then we have Mr. Groom. You heard him testify. He is a taxi driver driving in that immediate vicinity, and his attention was attracted when he saw these men beating this other man on the sidewalk.

And he told you how close he drove to them, and not only that, but he said that he attempted to run them over in order to apprehend them for committing this crime. And he told you how far he followed them and identified them at the time that they were apprehended.

And he was told by the police to continue on and deliver his passenger. And he said the next day, when he saw them, that he identified the Defendant Robinson and the Defendant Reid.

So, ladies and gentlemen of the jury, from the evidence in this case we have a positive identification of these two defendants; in addition to the identification, as I say, we find them in the immediate vicinity after this crime has been committed which you can consider as corroboration as to the identification of both these defendants.

And from the evidence in this case, ladies and gentlemen of the jury, the Government is asking you to bring in a verdict of guilty as charged.

* * * * *

155 CLOSING ARGUMENT ON BEHALF OF DEFENDANT ROBINSON

BY MR. GARBIS:

May it please the Court, Your Honor: Ladies and gentlemen of the jury:

Mr. McLaughlin, a fine prosecutor, will try and have us attack the honesty of the Government witnesses. This is not what is under

attack because we believe that they are trying to be honest, but we submit to you that they are erroneous either because they don't remember accurately or some distortion has taken place in their memory.

We believe that the evidence will show you this: Mr. McLaughlin will speak twice. Mr. Tinney and I will speak once on behalf of the defendants. So in fairness if Mr. McLaughlin should raise any points in his second argument which we haven't conceived of ahead of time, I ask you to try to think how we would have answered them and weigh our hypothetical answers against the points which he raises.

The major point Mr. McLaughlin seems to have raised so far is that the presence of these two boys and those two boys on that street at that time is corroboration of the identification.

Our major point is this is not corroboration. This is the reason
156 for the identification. That these boys and those boys were picked out as thieves and robbers because they were walking along the street.

It must be pointed out as to Mrs. Woods, as for Mr. Lowry, their identification took place after the four men were all charged with the crime in Municipal Court, and were being taken away to the Jail where all four of them spent four days.

Another point I shall make is this: Mr. Groom on the stand stated that he never said he saw four men attack Mr. Lowry. Yet the police report says that he told the police he saw four men and what is more important is this: Whatever we may think from our common experience about the efficiency of the police force, and Washington has a fine one, would they lock up those two boys unless somebody pointed them out as the robbers?

They were all four pointed out by Mr. Groom. I think we can accept that, particularly in light of what the police report says, which is an accurate reflection of events as they happen.

But now let's see what happened. First of all, this Mr. Lowry, and this is the story as old as pool halls, he was flush, he had $115, not in his wallet, he kept it loose in his front pocket.

157 There was a big pool game, $10 a game the men were playing for. That roll was coming in and out, money flowing and the crowd gathering around the pool hall to watch this big game.

Mr. Lowry entered that pool hall having bought a bottle of gin and he left with half bottle in his pocket. He said he drank some. I surmise he might have drank the entirety of that half bottle.

Flashing the roll he walks out and what happens in a situation like this? Somebody in that pool room saw him flashing that roll. And somebody saw what was obviously his condition. Two men attacked him from the rear and he was brutally beaten.

But he says he saw a man and got a good look at him. He said he got a flashy glimpse at one of the men and pointed out this boy here, but he didn't get a look at his face as he remembers.

He doesn't remember whether this man had a mustache or not. That was no trick question, that was a question to indicate he didn't get a look at the face at all.

The first time identification came was the next day after the charge was in. He tried to think back. What's more significant is the fact that Mr. Lowry was virtually unconscious from the time he was struck and
158 knocked to the ground.

Think of the things he does not remember, not the things told to him by somebody else later. He doesn't remember Mr. Groom coming around the second time and stopping the cab. He doesn't remember the police officers bent over him to try to help him.

The man was brutally hurt. He was a bloody mess. And also, I might add, he was probably considerably drunker than he'd like you to believe.

This was a shame but his identification on a fleeting glance of Mr. Robinson is preposterous.

Secondly, as Mr. Lowry indicated to you, and he is an honest man even though I believe his memory is not quite accurate in some points. He never identified anybody on that street corner at 17th, New Hampshire and Swann Street that night.

He told you that. But Mr. Groom has him identifying two people. Mr. Groom was not in control of himself as the evidence shows. I don't know how far it went, but he saw things which were not there, he did things which are the indications of some kind of man who is totally out of touch with reality for that period of time.

159 Look at Mrs. Woods. Now I don't know why Mrs. Woods has to wear those heavily tinted glasses that she wore even in this courtroom, but I don't believe Mrs. Woods is being completely accurate.

She says those heavily tinted glasses do not affect her vision at night. This was a dark area. First of all, the robbers, wherever they may have been, no doubt came crashing on Lowry from behind and wouldn't pick the brightest spot in the world.

Second, we have the evidence from Mrs. Woods that the spot was dark enough for the city to install new lighting. She was tired, worked from 7:00 in the morning until 5:00 in the evening, and maybe later.

She was serving soup to a man in the kitchen. She came out and believed she saw a murder because somebody was using a knife on the victim's pocket.

Whoever did this robbery knew which pocket to go for and knew where that roll was, or both of them did. Mrs. Woods was highly excited when it happened.

Also, her identification was not a fair identification in the sense that men were lined up, and she must pick from a group of men. These men were already identified by Mr. Groom, they were charged with the robbery before a Judge in Municipal Court.

160 She looked, and I don't know whether she had her sun glasses on in court. Probably since she had them on here she had them on there.

She picked out two, she picked out this boy Reid when she was not even sure of him. She didn't identify him.

She picked out Robinson even though she didn't get a good glimpse of his face. This again was after the fact.

It was because Mr. Groom picked out all of them. I say Mr. Groom was completely out of control.

First of all I asked, and your recollection governs. The blood was not brought out by Mr. McLaughlin. It was brought out by cross examination.

The defense knew that Mr. Groom had seen blood. This was so preposterous we had to bring it out to show what kind of man it is.

What kind of man is it? He has a woman passenger. He sees a robbery and is not content to call the police, flash his lights and get a good mental picture. This passenger was so frightened as Mr. Groom says, she could hardly speak.

He drove up on the scene, opened the door, came out. He yelled something in a very excited fashion, got back into the cab, and then while one of these robbers was standing over Lowry presumably cutting the
161 pocket, he backed his cab into the robbery, he didn't think about Mr. Lowry.

Fortunately he missed Mr. Lowry; unfortunately he missed the thief. If he had hit the thief this would be over, these boys would not be here and the four of them would not have spent ten days in Jail for nothing, particularly those two who had nothing to connect them.

Then Mr. Groom sees the boys run through the liquor store lot. He turns out his lights. I don't know why he turned out his lights. He did. He admitted, and you know drivers, cab drivers are not ones likely to admit they drive fast.

Mr. Groom drove at a pretty good speed, he said, down T Street, toward 17th, without any lights at 12:30 at night. He wasn't thinking about an accident. This woman passenger was still frightened. He jumped a red light at 17th, Swann and New Hampshire, zipped up along Swann Street and then he saw those two boys, these two boys walking along the street.

Walking along the street. Not fleeing down through some alleys, not running somewhere, not showing any signs of particular haste to get anywhere, but walking up the street just like you might be walking up the street or your sons or nephews.

162 Immediately in his mind those were the four. He came around again and this woman passenger was still excited. He told the police that he

saw those four jump on Mr. Lowry, beat him brutally and commit this crime.

The police, and as we have said, the police aren't in this case as far as idenitifcation is concerned, got in the cab with Mr. Groom. This time he turned on the lights.

There is something significant in this. I am not sure what it is. Because he was a taxicab, he had a pretty good speed on him. He stopped near these four boys, the police got out, they were placed under arrest.

Mr. Groom saw blood when there was no blood. Mr. Groom acted in a reckless manner. If he had hit somebody, I ask you what you would have thought of his behavior when he was driving as fast as he must have been without lights in the middle of the night.

And this blood. Mr. McLaughlin is a fine prosecutor, one of the best there, but if he asks you to believe that anybody saw that blood on those boys, of the brutally beaten victim, and he didn't produce that person who saw the blood, then he is asking you for a little bit too much.

When the police report shows no blood, he is asking you to believe

163 that trained police officers evidently don't think blood is important in a case like this.

There was blood because Mr. Groom now remembers he saw blood because it helps him to make his case, whatever reason this is. This may not even be a conscious thing.

Mr. Groom remembers that Mr. Lowry came up and picked out the same two boys that he did. This didn't happen. Mr. Lowry admitted that. Mr. Groom, although he wants to deny it, cannot deny that he told the police that he saw all four boys jump on this poor victim, beat him up and take his money.

The money, of course, there is no evidence of that. There is no evidence these boys had the money on them, that they had ditched the money or anything of that sort.

The knife one of them was wielding, where is the evidence of that? They had no knife. If they had a knife, Mr. McLaughlin is a fine prosecutor and he would have had that in the case.

If any money, that would have been in the case. If there was any sign these two boys or any of those boys had exerted themselves, they were sweating, that they looked in any way disheveled like they had participated in this kind of robbery, that too would have been in the case.

All we have is Mr. Groom. Ladies and gentlemen, I submit to you,
164 I don't know when, but certainly at the moment that he tried to back up over the robber and Mr. Lowry, he lost control of himself, he ceases to be a reliable witness.

Ladies and gentlemen, there are times when the prosecution tells you that you sit here as citizens at his table. That may be true, but not when you are in the jury box, because then you sit on the bench next to His Honor.

You have a very important role. That is the role which you will always carry. You will either be the judge or you will as citizens sit at this table, unless, pray to God, you sit at that table.

But this won't happen. This won't happen if juries can take people walking along the street picked up in such a case as this, and tell the prosecution, let's just not convict people like that, brand this fellow for life so whenever they apply for a job --

MR. McLAUGHLIN: I don't think that is permissible, Your Honor.

THE COURT: What was that?

MR. McLAUGHLIN: He was arguing about what might happen afterwards.

MR. GARBIS: Only as to their being labeled felons.

MR. McLAUGHLIN: That is not their concern, Your Honor; just
165 whether they are guilty or not guilty.

THE COURT: Were you talking about the sentence?

MR. GARBIS: No, Your Honor, only in regard to their being labeled felons.

THE COURT: Naturally if they are convicted they are convicted of a felony, but you should not discuss the matter of punishment.

MR. GARBIS: Of course not, Your Honor.

As I was saying, for the rest of their lives if anyone asks them if

they have ever been convicted of a crime they have to say Yes, robbery, felony.

Ladies and gentlemen, I ask you, on the evidence in this case, to label these boys in that manner, you label them as felons for life.

CLOSING REBUTTAL ARGUMENT ON BEHALF OF THE GOVERNMENT

BY MR. McLAUGHLIN:

Ladies and gentlemen of the jury:

As far as your duties are here, my friend says about you being next to the Judge, you are sitting here. Although there is only 12 of you sitting in this jury box, you represent the entire population of the District of Columbia.

It is by your verdicts that will be decided whether or not we have
166 law and order on our streets here in the District of Columbia.

Your duty here, ladies and gentlemen of the jury, in this particular case, is to decide this case on the evidence as it comes from the witness stand. And if the Government has proved sufficiently for you to say from witnesses who actually took that witness stand that these defendants are guilty beyond a reasonable doubt, then ladies and gentlemen of the jury, it is your duty to find them guilty.

In other words, that is your purpose in being here. Either to find them, the defendants, guilty or to find the defendants not guilty. The later consequences is no concern of yours, that is up to His Honor.

My friend tells you about Mr. Lowry. He tells you in one breath that he is an honest man and then in the next breath he tells you not to believe him.

He tells you that Mr. Lowry has a faulty recollection. Well now, you heard the questions asked Mr. Lowry.

Ladies and gentlemen of the jury, I am sure you agree with me that they were more or less on the ridiculous side. Here is a man that has been laying on the street and received this severe beating, and he is asked a question, Well, were you even with the door? Questions like that,
167 naturally, no one could answer.

And then he tells you about Mrs. Woods, trying to infer to you that

because of her eyes, the glasses, that she was unable to see what she said she saw. But you recall from that witness stand when she was shown the diagram, she had no difficulty at all in seeing even the T, ladies and gentlemen of the jury, and I bet it is a little blurred to a lot of you and she saw it from the witness stand, some distance. So is there anything faulty about her eyes?

And then he condemns Mr. Groom, condemns him for what? For being an honest citizen? To try to prevent someone being assaulted and attacked on our streets.

I say, under the circumstances, ladies and gentlemen of the jury, unless Mr. Groom acted like he did, he would be neglecting his responsibility as a citizen of our District of Columbia.

Now he tells you, Well, Mr. Groom rode through the streets with his lights out and all that. What are you going to do, crucify him for that? He was driving without lights, naturally. He was trying to detect as to where these men went to apprehend them.

You heard Mr. Groom testify. You had an opportunity to see him, to hear him, and also to more or less size him up, as to whether or not
168 he was telling the truth. Has he got any ax to grind with anyone in this case? Have they shown you any animosity on his part towards these defendants?

Have they shown you any reason why he should come down here and deliberately lie as to what he saw on the morning of January 13th?

You will recall the police officer and you recall him testifying that he had been on the force for two years, and he is no longer on the force. I don't know what the reason is, but you recall his testimony that when he said that Groom drove him to the vicinity of these men that Mr. Groom said There they are.

And Mr. Groom was allowed to go on and continue on and deliver his passenger. From the testimony of the police officer from that witness stand, Mr. Groom did not identify four men. All Groom said when he let the police out of the car was, There they are.

So when he tells you about it being the figment of the imagination of

Mr. Groom, ladies and gentlemen of the jury, it is not Mr. Groom who has the faulty memory, it is the police officer who has the faulty memory and when they tell you about the police officer not being able to recall the blood, you recall when he testified he first saw Mr. Lowry, remember this, the only thing he said that he observed about Mr. Lowry was the

169 disarranged clothes and here we have a man bleeding from the face with two or three teeth knocked out.

The police officer don't say a word about that. Do you recall that? He said when he observed Mr. Lowry all he said was he noticed was the disarranged clothes upon the part of Mr. Lowry.

Don't blame Mr. Groom or don't detract from Mr. Groom's testimony because of some failure of the police officer who was handling this case.

My friend says, Well, being found in the immediate vicinity should not be considered corroboration by you. Now ladies and gentlemen of the jury, this is the wee hours of the morning. We accounted for where Mr. Lowry was coming from. Where were these defendants coming from?

What were they doing in that immediate vicinity at that time? Were they at that pool room?

My friend says about seeing Mr. Lowry flash this roll as he says. Did these defendants have an opportunity to know that Mr. Lowry had this money on his person?

And my friend, ladies and gentlemen of the jury, condemns the locking up of the four men. You heard under what circumstances they were locked up. But haven't the defendants been treated fairly in this case?

170 Has there been any advantage taken of the other two men? When the case is identified later, and investigated, and we find no identification of the other two men, are we being honest? Are we having Mrs. Woods say Yes I saw these other two men? Are we having Mr. Groom identify more men merely because they were locked up?

You can't blame Mr. Groom or Mr. Lowry or Mrs. Woods for their identification merely because the police locked up four men, because there

is no testimony at any time that either Mr. Lowry, Mrs. Woods or Mr. Groom identified anyone else but these two men.

So I say to you ladies and gentlemen of the jury, from the evidence in this case and from the testimony as it comes from that witness stand, the Government has shown you enough evidence to find these defendants guilty beyond any reasonable doubt.

MR. GARBIS: May we approach the bench, Your Honor?

THE COURT: Yes.

(AT THE BENCH:)

MR. GARBIS: Your Honor, I have to move for a mistrial based on Mr. McLaughlin's argument which tended to come very close to commenting on the failure of the defense to put on a case, tended too closely to putting the burden on the defendants to take the stand.

171 THE COURT: Motion will be denied.

Do you want me to give the instruction on the failure of the defendants to take the stand, or not?

MR. GARBIS: May I confer with counsel?

THE COURT: Yes.

(Brief pause.)

MR. GARBIS: No.

THE COURT: The record will show then that the Court has inquired of counsel for both defendants whether the Court should give the instruction on the failure of the defendants to take the stand, and both counsel have requested the Court not to give such instruction; is that correct?

MR. TINNEY: That's right.

THE COURT: Is that correct for you too?

MR. GARBIS: Yes, Your Honor.

THE COURT: All right.

(IN OPEN COURT:)

CHARGE TO THE JURY

THE COURT: Ladies and gentlemen of the jury: The evidence has been completed. Counsel have made their final arguments to you, and it now becomes my duty to instruct you as to the prinicpals of law which are to guide you in your deliberations and in the determination of your verdict

172 in this case.

In this Court, of course, the instructions by the Judge are given orally and I am giving them to you now. They are given only once. You will not receive any transcript or pamphlet concerning the charge of the Court. You must hear the law now as I give it to you and follow it closely, therefore, and be prepared to apply it to the sworn testimony in the case.

This case has been a short one. Therefore, the evidence, I am sure, is fresh in your minds and it will not be necessary for the Court to go into detail in outlining the contentions of the parties. The Court will briefly summarize, as the Court recollects the evidence, in its charge the position of the parties, but you will bear in mind that you are the exclusive judges of the facts and if any statement is made in the Court's charge in the summary of the evidence that conflicts with your own recollection of the testimony, you should rely solely upon the sworn testimony in this case.

Likewise, this applies to the arguments of counsel on both sides. The arguments of counsel should be listened to attentively as you did listen to them, but arguments of counsel do not constitute evidence, and if any statement has been made in the argument of either of these counsel

173 which conflicts with your own rememberance of the evidence, you should rely solely and exclusively upon your own recollection of the testimony in this case.

Sometimes jurors will come back even shortly after they have gone to the jury room and request the Court to have certain portions of the testimony re-read. This is not very satisfactory as a practice, because only a portion of testimony read out of context of the entire sworn testimony in the case sometimes does not give the correct impression and

therefore it is better, of course, for the jurors to rely upon their recollection and rememberance of the testimony which they will have to do in this case, and of course, it is easier to do it in a case of this kind which has been a very brief case than it would be in a more protracted case.

Now with reference to what the law is, the Court reigns supreme. You must accept the law just as the Court gives it to you regardless of any opinion you may have as to what the law is or what it ought to be. On the other hand, you ladies and gentlemen, are the exclusive judges of the facts. It would not be proper for me to tell you how to decide this case, and I am sure you have not gathered any impression thus far from anything that has transpired here as to how the Court feels the facts should be decided, and you should not try to gather any impression from

174 what the Court says in its charge how the Court feels the facts should be decided, either by what the Court says or the tone of the Court's voice, or the manner in which the Court presents briefly the respective contentions of the parties to you. Because even though under our Federal system Federal Judges have the right to comment upon the evidence, I have made it a practice not to do so feeling that as long as the jurors are the exclusive judges of the facts, I would prefer to leave it entirely up to the jury, and leave the jury free from anything which might indicate how the Court felt the facts should be decided. You should not try to gather any impression as to how the Court feels the facts should be decided in this case.

Now because you are the exclusive judges of the facts, ladies and gentlemen of the jury, you are of necessity the sole judges of the credibility of the witnesses, and in determining credibility you may take into consideration certain common sense rules that many of you will recognize as I suggest them to you. They aren't the only things you may take into consideration for credibility, I am only suggesting a few rules that you may if you deem it proper to do so, take into consideration in determining the credibility in this case:

175 The manner, conduct and demeanor of each witness, for example,

who testified; his memory or lack of memory; the faculty or lack of faculty of each witness to see and hear those things about which he has testified. Of course, when I use the pronoun "he" I mean "his or her." The ability or lack of ability of each witness to convey to you through the medium of words what he has seen or heard. The reasonableness or unreasonableness of the story that is told from the witness stand. Any bias or prejudice shown by any witness which might have influenced his judgment or colored his testimony, and all those other factors including interest in the outcome of the case which you as intelligent and experienced people take into consideration when you determine the difference between truth and untruth or truth and halftruth.

And if, in your opinion, any witness has in this trial testified wilfully falsely or corruptly with reference to any material fact concerning which he could not possibly have been mistaken, you are at liberty if you deem it wise so to do, to disregard the entire testimony of that witness or any part of that witnesses testimony except insofar as it has been corroborated by credible witnesses or by facts and circumstances established by the evidence in this case.

Now you ladies and gentlemen of the jury are the fact finding branch
176 of this Court, and in the performance of your duties you must not let sympathy, passion or prejudice influence your judgment in any manner whatsoever. You must reach your judgment on the facts as disclosed by the evidence adduced in open Court and inferences which are reasonably deducible therefrom. You are not to speculate, conjecture or guess.

These two defendants, Edward G. Robinson and Enos W. Reid, have been on trial in this court on this one count indictment charging them with robbery. Omitting the caption the indictment reads:

> The Grand Jury charges that on or about January 13, 1962, within the District of Columbia, Edward G. Robinson and Enos W. Reid, by force and violence and against resistance and by sudden and stealthy seizure and snatching and by putting in fear, stole and took from the immediate actual possession of George W. Lowry, property of George W. Lowry of the value of about $115, consisting

of the following: $115 in money.

Now to this indictment each of the defendants have entered a plea of not guilty and thus each of the defendants put in issue each and every essential element and allegation contained in said charge in the indictment.

177 You will recall when I examined you prospective jurors on the voir dire I told you that the mere fact that these two defendants sit here and are charged with this offense does not constitute evidence that they are guilty of the offense. The mere fact that these two defendants have been indicted is no evidence of their guilt because an indictment is merely the procedure and the machinery by which a defendant is brought before the Court and is placed on trial.

I also told you on the voir dire and I repeat it now that it is a rule of law that every defendant in a criminal case is presumed to be innocent, and this presumption of innocence relates to every essential element of the offense and attaches to him throughout the trial until overcome by legal evidence which establishes his guilt beyond a reasonable doubt. It is also the law that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that each of these defendants has committed every element of the offense with which they are charged, the jury must find them not guilty.

Now proof beyond a reasonable doubt does not mean proof beyond all

178 doubt whatsoever. It does mean proof to a moral certainty and not necessarily proof to an absolute or a mathematical certainty. A reasonable doubt is not a vague, speculative or obscure doubt. Rather it is such a doubt as would cause you to hesitate to act upon it in the graver and more important transactions of life.

If after an impartial consideration of all the evidence you can say to yourselves that you are not satisfied of the defendants' guilt, then you have a reasonable doubt. Unless there is substantial evidence of facts which exclude every reasonable theory but that of guilty, your verdict must be not guilty. In other words, to find these defendants guilty, any reasonable theory of innocence must be excluded by the facts.

But, on the other hand, if after such impartial consideration of all of the evidence you can truthfully and candidly say to yourselves that you have an abiding conviction of the defendants' guilt, such as you would be willing to act upon in the more weighty and important matters pertaining to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defendants' guilt on your part, such a conviction as you would be willing to act upon in the more weighty
179 and important matters relating to your own affairs.

Now as I indicated to you before, members of the jury, these two defendants are charged with the offense of robbery. This offense is brought under a provision of the District of Columbia Code which defines robbery as follows:

> Whoever by force or violence whether against resistance or by sudden or stealthy seizure or snatching or by putting in fear shall take from the person or immediate actual possession of another anything of value, is guilty of robbery.

You will notice it is not necessary for the Government to prove beyond a reasonable doubt that there was taken in the robbery the property of a particular value, the language is anything of value.

Now very briefly, and as I indicated to you before, it is not my purpose here to detail the evidence. The case is so brief it is not necessary. And I want to mention further that if I should appear to place the claims out of balance according to your memory, you should rely solely upon your recollection in the case.

It is the Government's position that in the early morning hours of
180 January 13, 1962, these two defendants committed the offense of robbery in the vicinity of 18th and T Streets, Northwest, in the District of Columbia. The complaining witness, George W. Lowry, testified that he had left a pool room and was going to a restaurant in the vicinity. When he arrived at 18th Street and T Street, Northwest, two men commenced beating him and that $115 was taken from one of his pockets.

This witness Lowry identified Robinson as one of the boys who robbed him.

Another witness for the Government Beatrice Woods, who was in an upstairs bedroom, came downstairs and heard what she described as blood curdling screeches, and then she went outside and saw several men pounding the complaining witness; that she yelled at them to stop and one man left and another man continued to pound the complaining witness. She, in her testimony here, in this trial, identified the defendant Robinson as one of the participants in this robbery but was unable to identify the defendant Reid.

The Government asserts that shortly thereafter or during the process of the robbery a taxi driver by the name of Lester R. Groom, who has testified here, arrived on the scene with a woman passenger, and that he saw two men beating the complaining witness; he opened the door and told them to stop; one of them ran, and in a few seconds thereafter
181 the other one ran from the scene. This witness has identified both defendants as participants in the robbery. Thus the Government asserts that it has proved beyond a reasonable doubt that both of these defendants are guilty of robbery as charged.

Now the defendants, on the other hand, deny that they committed the robbery and assert that the Government has failed to prove beyond a reasonable doubt that the robbery was committed by these defendants. Defendants assert that the identification is uncertain and not sufficient under the Government's burden to prove the identification beyond a reasonable doubt.

The Defendant Reid asserts as to him that two of the Government's witnesses were unable to identify him. Both defendants also assert that the identification is not credible because it was made after the defendants were charged and the hearing was had in the Municipal Court.

The Defendant Robinson maintains that because the witness Groom who testified on the stand that there were only two men in the robbery, whereas the police report indicates he told the police there were four men involved, that his testimony is not worthy of belief as far as the identification is concerned.

182 The Defendant Robinson also maintains that the witness Mrs. Woods had poor eyesight and her identification, therefore, should be disregarded. Thus the defendants assert that the Government has failed to prove beyond a reasonable doubt that the defendants are guilty of robbery.

Now these in the main are the principal contentions. As I indicated before, they do not outline in all detail the evidence, but I am sure you will recall the testimony and you should rely solely upon your own recollection of what the evidence has been.

Now it is a law in the District of Columbia, members of the jury, that in any prosecutions for any criminal offense all persons advising or inciting or conniving at the offense, or aiding or abetting the principal offender shall be charged as a principal.

You are told that a person who advises, incites or connives in any offense, or aids or abets a principal offender is himself a principal offender under this law whether or not he was personally present at the time of the offense.

In other words, such a person is just as responsible under the law as a person who commits a physical act which violates the law.

183 The word "connive" as used in this law means to cooperate with. The word "advise" to give an opinion or recommend a course of action. The word "abet" means to encourage or incite another to commit a crime.

A person aids and abets an offender when he assists him by words or acts. An aider and abettor is one who associates himself with a venture, a criminal venture, and participates in it as something that he wishes to bring about.

Now there has been evidence in this case, members of the jury, that these two defendants fled from the scene of the alleged robbery. You should not consider the evidence of flight unless you find that at the time of flight the defendants knew that a crime had been committed and knew that they would in all probability be charged with the crime. Nor should you consider the evidence of flight unless you believe that the motive in fleeing was to avoid arrest and trial on the offense here charged.

You may consider the evidence of flight as relevant insofar as it tends to connect the defendants up with the crime charged. The fact of flight alone is not sufficient evidence to warrant a finding of guilty. It is for you to determine the significance or insignificance to be given the evidence of flight. You should give it whatever weight you deem worthy
184 when you consider it along with all the other evidence in the case.

Now, of course, as has been indicated from the arguments of counsel, the testimony here of the Government relies upon the matter of identification. Because there is a possibility of error in memory and in other factors in identifying one accused of crime, the law is that if the circumstances of the identification are not convincing, the jury should find the defendants not guilty. The Government must prove beyond a reasonable doubt that the defendant is the person who participated in the alleged offense.

You will consider this case, therefore, members of the jury, in the light of the instructions that I have just given to you, using the same practical approach, the same common sense, the same ordinary intelligence that you would employ in the course of your every-day experiences.

You are aware, of course, that the verdict must be unanimous. Upon reaching the jury room you will first select a foreman or forewoman from among your ranks who will preside over your deliberations in the jury room and speak for you when you return your verdict to this Court.

Then you will proceed to reach a verdict impartially, without sympathy, passion, prejudice or emotion of any kind, one way or the other.
185 A typewritten form of verdict is being submitted to you. Omitting the caption, it reads: We the jury find the defendant Edward G. Robinson, then on the left-hand side the words Count 1, robbery, and then there are two blank lines, under one blank line is the word "guilty," and underneath the other blank line are the words "not guilty." You will check off whichever one should be checked in accordance with the verdict that you decide that should be rendered in this case.

And beneath these typewritten words are similar words as far as the defendant Enos W. Reid is concerned. You will check off whichever

line as far as this defendant is concerned should be checked in accordance with the verdict rendered as to this defendant.

Then have the verdict signed by the foreman or forewoman, dated, and returned to this Court.

Anything further from the Government?

MR. McLAUGHLIN: No, Your Honor.

THE COURT: Anything further from the defendants?

MR. GARBIS: No, Your Honor.

* * * * *

190 FOREMAN GERSHBON: May we again have your definition.

THE COURT: It reads: "May we can have your definition of reasonable doubt."

FOREMAN GERSHBON: It should be "again," I'm sorry.

THE COURT: All right. I will repeat my definition of reasonable doubt.

It is the law, members of the jury, that the burden of proof is upon the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense

191 with which he is charged, the jury must find him not guilty.

Now proof beyond a reasonable doubt does not mean proof beyond all doubt whatsoever. It does mean proof to a moral certainty and not necessarily proof to an absolute or mathematical certainty. A reasonable doubt is not a vague, speculative or obscure doubt. Rather it is such a doubt as would cause you to hesitate to act upon it in the graver and more important transactions of your life.

If after an impartial consideration of all the evidence you can say to yourselves that you are not satisfied of the defendants' guilt, then you have a reasonable doubt. Unless there is substantial evidence of facts which exclude every reasonable theory but that of guilty, your verdict must be not guilty. In other words, to find the defendant guilty any reasonable theory of innocence must be excluded by the facts.

But on the other hand, if after such impartial consideration of all the evidence you can truthfully and candidly say to yourselves that you have an abiding conviction of the defendants' guilt, such as you would be willing to act upon in the more weighty and important matters pertaining to your own affairs, then you have no reasonable doubt.

192 In other words, proof beyond a reasonable doubt is such proof as will result in an abiding conviction of the defendants' guilt on your part, such a conviction as you would be willing to act upon in the more weighty and important matters relating to your own affairs.

You may proceed to the jury room to deliberate.

THE DEPUTY MARSHAL: Jurors retire to the jury room.

(Whereupon, at 9:55 o'clock a.m., the jury retired to the jury room for further deliberation.)

VERDICT

(Whereupon, at 10:00 o'clock a.m., the jury re-entered the courtroom for the verdict.)

THE DEPUTY CLERK: Will the Foreman please rise?

Mr. Foreman, has the jury agreed upon a verdict?

FOREMAN GERSHBON: Yes, it has.

THE DEPUTY CLERK: Members of the jury: Your Foreman says that you find the Defendant Edward G. Robinson guilty as indicted; and that you find the Defendant Enos W. Reid guilty as indicted, and that is your verdict so say each and all of you?

193 (There was general agreement among the jurors.)

* * * * *

[Filed November 13, 1962]

JUDGMENT AND COMMITMENT

[Edward G. Robinson]

On this 9th day of November, 1962 came the attorney for the government and the defendant appeared in person and by counsel, Marvin Garbis, Esquire.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty of the offense of ROBBERY as charged, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of One (1) Year to Three (3) Years.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ LUTHER W. YOUNGDAHL
United States District Judge

A TRUE COPY:
* * *